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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
11 AT TACOMA

12 STEPHEN KNIGHT LEWIS,

13 Plaintiff,

14 v.

15 CITY OF LAKEWOOD, *et al.*,

16 Defendants.  
17  
18

No. 08-5589FDB

ORDER ADOPTING REPORT AND  
RECOMMENDATION GRANTING IN  
PART DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

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20 This matter comes before the Court on the Recommendation of the Magistrate Judge that  
21 Defendants' motion for summary judgment be granted in part. Neither party has filed an  
22 objection to the Magistrate Judge's recommendation.

23 This 42 U.S.C. § 1983 civil rights action alleges that the Defendants used excessive force when  
24 arresting Plaintiff and that a blood draw performed to determine the amount of alcohol that was  
25 in his blood was in violation of his Fourth Amendment rights.  
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1 As detailed by the Magistrate Judge, Plaintiff's claims regarding the blood draw is a  
2 challenge that attacks the validity of his driving under the influence conviction. A challenge  
3 that necessarily implies the invalidity of the judgment, or continuing confinement, must be  
4 brought as a petition for a writ of habeas corpus, not under § 1983. Butterfield v. Bail,  
5 120 F.3d 1023, 1024 (9<sup>th</sup> Cir. 1997). Accordingly, this claim must first be raised in a habeas  
6 proceeding, not a civil rights claim for damages.  
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8 Regarding the issue of the use of excessive force, the Magistrate Judge re-noted the  
9 motion to permit the Plaintiff the opportunity to present admissible evidence in support of his  
10 allegations. The Court finds appropriate the brief extension of time to afford the pro se Plaintiff  
11 time to present evidence in support of his claim.

12 The Court, having reviewed the Report and Recommendation of Magistrate Judge J.  
13 Richard Creatura, and the remaining record, does hereby find and ORDER:  
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- 15 (1) The Court adopts the Report and Recommendation;
- 16 (2) The Defendant's Motion for Summary Judgment is **GRANTED IN PART**. This  
17 action is **DISMISSED WITHOUT PREJUDICE** as to the claim regarding the  
18 blood draw.
- 19 (3) Claims relating to excessive force are referred back to Judge Creature for further  
20 proceedings.
- 21 (4) The Clerk is directed to send copies of this Order to plaintiff, and to the Hon. J.  
22 Richard Creatura.

23 DATED this 28<sup>th</sup> day of September, 2009.

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26 FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE